



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 183 OF 2013

RICHARD KISIANG'ANI WEPUKHULU.....CLAIMANT

-VERSUS-

TAIDY'S RESTAURANT.....RESPONDENT

(BEFORE HON. JUSTICE BYRAM ONGAYA ON FRIDAY 20TH DECEMBER, 2013)

JUDGMENT

The Claimant is **Richard Kisiang'ani Wepukhulu** and the respondent is Taidy's Restaurant. The claimant filed the memorandum of claim on 20.06.2013 in person. The claimant prayed for:

- a. **Wages due for February 2013.**
- b. **48 days wage being 2 years annual leave.**
- c. **Lifting of indefinite suspension.**
- d. **Restoration to the employment without loss of any employment benefits.**
- e. **Payment of all the outstanding wages and allowances for the entire period of suspension up to and including the date of the determination of this suit.**
- f. **Cost of the suit.**
- g. **Any other remedy the court may deem fit.**

The claimant subsequently appointed Geoffrey Otieno & Company Advocates to act for him in the suit.

The respondent filed the statement of defence on 17.07.2013 through R.W.Chege & Associates and prayed that the claimant's suit be dismissed with costs.

The case was heard on 6.11.2013. The claimant gave evidence to support his case and the respondent's witness (RW) was the General Manager, Festus Kigen stationed at the respondent's Kericho branch.

The claimant was engaged by the respondent as a Food and Beverage Controller on 22.11.2008 at monthly pay of Kshs.22,000.00 and increased to Kshs. 35,000.00. At suspension on or about 30.12.2012, the claimant was serving in the position of Branch Manager at the respondent's Nakuru branch.

By letter dated 30.12.2012 being exhibit **RKW2** on the memorandum of claim, the respondent transferred the claimant from the Nakuru branch to the Nairobi branch in the position of assistant manager, food and beverage controller. The transfer was to take effect from 02.01.2013. The letter directed the claimant to make all necessary arrangements so as to report to the new station by 01.02.2013. He was directed in the letter to handover to the General Manager pending the appointment of the branch manager to replace him at the Nakuru branch.

The claimant testified that he reported to the new branch in Nairobi on 18.02.2013 and not on 02.01.2013 as expected. He testified that the delay in reporting was because the respondent failed to facilitate his travel to Nairobi. The facilitation was to entail fuel for the respondent's car allocated for the claimant's use and settlement costs. The claimant further testified that from 9.01.2013 to 8.02.2013 when he handed over, he was recalled on duty at the Nakuru office. After reporting at Nairobi on 18.02.2013, he travelled back to Nakuru on 19.02.2013 to arrange for his family in view of the transfer under an oral three days' off with the branch manager, Nairobi.

On 20.02.2013, the claimant testified that he was preparing to travel to Nairobi but he was called to the Nakuru office and given the letter of suspension, exhibit **RKW4** on the memorandum of claim. The letter stated as follows:

“Re: Indefinite Suspension

This letter serves to give you notice that with immediate effect, you are being placed on unpaid indefinite suspension for absconding duty.

You are therefore directed to hand over any company property in your possession to the branch manager, Nakuru, including the company vehicle.

The purpose of this suspension is to impress upon you the seriousness with which we regard the above matter and give you the opportunity to reflect upon your future compliance with the company's service terms.

Sincerely,

Signed

Festus Kigen

General Manager”

The Claimant testified that he expected overtime payments and after the suspension letter, he tried to speak to the director but the director declined to pick the telephone calls. On 15.04.2013, he reported a grievance at the Labour Office but the respondent declined to respond. The claimant testified that he never absconded because from 31.01.2013 to 18.02.2013 he was working from the Nakuru branch office. On 22.1.2013 to 24.1.2013, he testified that he was granted 3 days leave and it was obvious that he was on duty at the Nakuru branch. He also testified that he did not proceed on annual leave for 2011 and 2012. The claimant confirmed that after the suspension, he conveyed short telephone messages to the directors on 28.02.2013 and on 21.02.2013 but there was no response on his fate in view of the indefinite suspension. He also confirmed that he was a member of Vioken Self Help Group, an organization of the respondent's staff and owed it a loan of Kshs.113,792.00 being the principal sum plus interest. He testified that he had issues with the welfare about his shares which he estimated at Kshs.80,000.00. The loan was repayable first from the shares and second from his final dues from the respondent.

RW testified that the claimant failed to report for transfer as per the transfer letter and he therefore decided to issue the letter of indefinite suspension. At suspension, RW testified that the outstanding leave days were 42 being about Kshs.30,000.00 and there were unrecovered bills of Kshs.15,477.00 as against the claimant. Of the bills, the claimant had testified that he countersigned as the manager and not as money he owed the respondent. RW testified that he did not know if the claimant was on duty at Nakuru from 1.2.2013 to 20.02.2013 but the branch manager in Nairobi called James Mbugua had called RW and reported that the claimant had not reported; but reasons for not reporting had not been given to RW. Thus, RW testified that he could not confirm the claimant's whereabouts from 1.2.2013 to 20.2.2013. RW did not know if claimant's dues were worked out. RW further testified that the claimant's position with the claimant was not vacant.

The only issue for determination in this case is whether the claimant is entitled to the remedies as prayed for. The court makes the following findings:

- a. The claimant is entitled to wages due for February 2013 as prayed for. The court finds that the suspension letter did not disentitle the claimant to the due wages and he is entitled to **Kshs.38,211.00** for February, 2013 being the last gross pay for January 2013.
- b. The claimant has claimed for 48 days wage being 2 years annual leave. The respondent has demonstrated by evidence that the due days as at suspension were 42 days. The claimant earned a basic pay of Kshs.22,100 for 24 working days in a typical month. Accordingly the court finds that he is entitled to **Kshs.42,190.90** for the 42 outstanding leave days.
- c. The claimant has prayed for lifting of indefinite suspension. The respondent's evidence shows that the claimant was suspended in circumstances whereby RW who wrote the suspension letter was not privy to claimant's being on duty from 1.2.2013 to 18.2.2013. On a balance of probability, there is no reason to doubt the evidence of the claimant that he worked in February and made oral arrangements for an off with the branch manager in Nairobi as testified. Accordingly, the court finds that the indefinite suspension was not agreed upon, was unfounded and the claimant is entitled to an order lifting the suspension.
- d. The claimant has prayed for restoration to the employment without loss of any employment benefits. The court has considered the relationship between the parties and finds that the indefinite suspension was not a termination but was conduct by the respondent that would entitle the claimant to consider himself terminated. The court has considered the circumstances of the case and finds that the claimant would be entitled to re-engagement effective 1.01.2014 or in alternative consider himself unfairly constructively terminated and therefore entitled to **Kshs.458,532.00** under section 49(1) (c) of the Employment Act, 2007 being 12 months gross salaries at the rate of Kshs.38,211.00 being last monthly gross pay for January, 2013.
- e. The claimant has prayed for payment of all the outstanding wages and allowances for the entire period of suspension up to and including the date of the determination of this suit. The court upholds its opinion in **Kenya Union of Printing, Publishing, Paper Manufacturing and Allied Workers – Versus – Timber Treatment International Industrial Court Cause No. 12 of 2012 at Nakuru at pg. 10-11 [2013]eKLR** where it was stated,

“In making the findings the court considers that the employee is entitled to pay for the period he or she is kept away from work due to unlawful and unfair suspension or termination. In such cases, the employee is entitled to at least partial reinstatement, and therefore compensation whose measure is the proportionate unpaid or withheld salary throughout that period of unlawful or unfair suspension or termination. During such period, the court considers that the employee carries a valid legitimate expectation to return to work and not to work elsewhere until the disciplinary or the ensuing conciliatory and legal proceedings are concluded. In arriving at the finding of entitlement to reinstatement during unlawful or unfair suspension and termination, the court has taken into account the provisions of subsection 49(4) (f) which states that in arriving at the proper remedy, there shall be consideration of, “(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for termination;”. The court is of the opinion that for the period the question of unfairness or fairness of the suspension or termination has not been determined, the employee carries a reasonable expectation that for the period pending the determination of that question, the employment has not validly terminated and the employee is entitled to reinstatement during that period provided the employee is exculpated; with pendency of such serious question, the employee is validly expected to pursue the resolution with loyalty not to work for another employer. It is the further opinion of the court that where the court finds that the suspension or termination was unlawful or unfair, the employee is entitled to at least partial reinstatement, and therefore, a total of the salaries due during that period. The exception (to such entitlement to partial reinstatement for the period pending a final decision on the dispute) is where it is established that during that period, the

employee took on other gainful employment or the employee fails to exculpate oneself as charged.”

Accordingly, the court finds that the claimant is entitled to pay for March to December 2013, the period the claimant has unfairly been suspended and kept away from work. He is entitled to **Kshs.265,200.00** at a basic pay of Kshs.22,100.00 per month.

f. The court finds that the claimant has substantially succeeded and is entitled to costs of the suit.

In conclusion, judgment is entered for the claimant against the respondent for:

1. the respondent to pay the claimant **Kshs.345,601.90**;
2. the respondent to reengage the claimant effective 1.01.2014 or in alternative to pay the claimant **Kshs.458,532.00** for unfair constructive termination;
3. the respondent to pay the amount in 1, and 2 as the case may be, by 1.2.2014, failing, interest to be payable at court rates from the date of the judgment;
4. the respondent to pay costs of the suit.

Signed, dated and delivered in court at **Nakuru** this **Friday, 20th December, 2013.**

BYRAM ONGAYA

JUDGE